Marriott Management Services, Inc. *and* United Electrical, Radio and Machine Workers of America (UE), Local 792. Cases 9–CA–30396, 9–CA–30414–1, –2, 9–CA–30466, and 9–CA–30606

July 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 13, 1994, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and, for the reasons set forth below, has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent received a letter of intent on June 1, 1992, from Wright State University to enter into a contract for food service previously provided by Service America Corporation (SAC). Although it hired its predecessor's employees and recognized their representative, Hotel Employees Restaurant Employees Local 70 (HERE), the Respondent's initial terms and conditions of employment differed from those under the predecessor.

We agree with the judge that the Respondent was not required to negotiate initial terms and conditions of employment with HERE Local 70. In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court stated,

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, *there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms*. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act . . . .'' [406 U.S. at 294–295. Emphasis added.]

The Board in *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975), held that the *Burns* ''perfectly clear'' caveat

> should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [*Spruce Up Corp*., supra at 195.]

In this case, the parties stipulated that in a June 1992 telephone conversation between Joseph Borgese, the Respondent's director of labor relations, and Steve Skaggs, HERE's Local 70 business agent, the Respondent made a commitment to hire all the former SAC employees. It is also undisputed, however, that on June 1, Skaggs and Howard O'Chocke, the Respondent's district manager, had a conversation in which O'Chocke made it clear that, although the Respondent would recognize Local 70, it would not adopt the extant collective-bargaining agreement. This conversation reflected earlier conversations in April in which O'Chocke told Skaggs that the health and welfare package and the pension plans would have to be changed. Skaggs agreed to the changes in the health and welfare and pension benefits as proposed by O'Chocke.[1] In these circumstances, we find that the Respondent—in its communications to Local 70—''clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment.'' *Spruce Up Corp*., supra at 195. Therefore, we find that the Respondent was not required to negotiate initial terms of employment under *Burns* and *Spruce Up*, and that the Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged by the General Counsel.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Marriott Management Services, Inc., Fairborn, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We recognize that the April and June 1 conversations occurred before the Respondent recognized Local 70 on June 26. Local 70 was the representative of the employees under the predecessor at the time of these conversations, however, and it is clear that both parties anticipated that Local 70 would remain the representative under the Respondent. In these circumstances, we regard the communications to Local 70 as communications with the employees through their representative. See *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994).

Vyrone A. Cravanas, Esq., for the General Counsel.
Carlton J. Trosclair, Esq., of Bethesda, Maryland, for the Respondent.
Karen Bahow, of Xenia, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was heard in Dayton, Ohio, on May 4, 5, and 6, 1994. The charges in Cases 9–CA–30396, 9–CA–30414–1, 9–CA–30414–2, 9–CA–30466, and 9–CA–30606 were filed by United Electrical, Radio and Machine Workers of America (UE), Local 792[1] in 1993 on February 11 and 18, March 5, and April 19, respectively. Consolidated complaints issued on March 30, April 5, and June 2, 1993. The third consolidated complaint alleges that Marriott Management Services, Inc.[2] violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act; Section 8(a)(1) independently, by removing union (UE) literature from the employees' bulletin board, issuing a warning memorandum to employees for participating in a union (UE) rally, telling employees that they were not allowed to engage in any discussions relating to the Union (UE), and telling employees that before Respondent would fill jobs with union (UE) employees, Respondent would close down its operation; Section 8(a)(1) and (3), by laying off employees Russell Lober and Eugene Turner, issuing a ''verbal'' warning to its employee Bonita VanZant and eliminating the employees' breakroom all because these and other employees engaged in union activities; and Section 8(a)(1) and (5), by unilaterally discontinuing health insurance, paid holidays, and other benefits, assigning a supervisor to do a job normally done by bargaining unit employees, assigning employees to bargaining unit jobs without posting the jobs for bid, and by failing to post jobs for bid that became available, and by utilizing supervisors or newly hired employees to do bargaining unit work, all without prior notice to the UE and without affording the UE an opportunity to bargain with Respondent with respect to these unilateral changes and their effects. Respondent denies the commission of any unfair labor practice.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. General Counsel and Respondent filed briefs. Upon the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT[3]

I. BACKGROUND

Respondent is a corporation engaged in providing food services at various locations throughout the United States including Wright State University in Fairborn, Ohio, where it employs approximately 63 employees. Prior to Respondent's successful bid in 1992 to take over Wright State's food service facilities, the University had for 20 years or more contracted with other food service providers to operate these facilities. From 1989 to 1992 Service America Corporation (SAC) provided these services. During this period, SAC's full-time unit employees were represented by HERE with the last labor agreement between the parties effective from October 18, 1989, through October 18, 1992.

II. RECOGNITION AND BARGAINING

About March 1992,[4] Wright State University sent out invitations to various food provider entities, including Respondent, to bid on the Wright State food service operations. Later in the month Respondent attended a bidders' conference where it obtained information concerning the operation upon which it intended to bid. Included in the information that it received on that occasion and subsequently was the fact that the employees were, at the time, represented by HERE. Upon learning this, Respondent requested and obtained a copy of HERE's collective-bargaining agreement with SAC.

Howard O'Chocke, a district manager with Respondent, credibly testified that when he obtained a copy of HERE's collective-bargaining agreement with SAC, he studied it and determined that there were two provisions contained therein which, if agreed to, would prevent Respondent from operating the facility successfully, one was the health and welfare package, which included medical insurance and the other was the pension plan. O'Chocke contacted a business representative from a HERE local at another university where Respondent had a labor agreement, Ron Stormer, and advised him of the problem. He asked him if he thought it would be possible to substitute the plans then in effect at that University for the ones contained in the SAC agreement. Stormer told O'Chocke that he would look into the matter and suggested that O'Chocke call Steve Skaggs, HERE's business agent at Local 70 at Wright State. O'Chocke agreed to do so.

In April, O'Chocke was in contact with Skaggs on two or more occasions. Historically, when Respondent took over an ongoing operation at a university from a predecessor food provider, it would hire the staff of employees already working at the site. It would recognize the union, if there was one, but would not adopt the existing labor agreement. Rather, it would begin anew, bargaining toward a fresh agreement. In the instant situation, O'Chocke proceeded under the same presumption, namely, that he would hire SAC's work force. When he talked to Skaggs, he advised him that HERE's contract with SAC was not satisfactory to Respondent because of the health and welfare and pension plans included therein. He asked Skaggs if the plans that he had discussed with Stormer could be substituted for those in the SAC agreement. Skaggs replied that he would work with Stormer and get back to O'Chocke with an answer. Subsequently, Skaggs called O'Chocke and agreed to the substitution of the plans. He requested that O'Chocke contact him if Respondent succeeded in obtaining the contract at Wright State.

On June 1, Respondent received a letter of intent from Wright State University to enter into a contract to provide food services. Shortly thereafter, O'Chocke contacted Skaggs

[1] Hereinafter called the UE.
[2] Hereinafter called Respondent, the Employer, or the Company.
[3] Jurisdiction and the status of the UE and Hotel Employees & Restaurant Employees Local 70 (HERE or Local 70) as labor organizations are admitted.
[4] Hereinafter all dates are in 1992 unless noted otherwise.

to so advise him. Skaggs thereupon requested O'Chocke to sign a recognition agreement with HERE, Local 70 and O'Chocke agreed to do so with the caveat that Respondent would not recognize the terms and conditions of the extant collective-bargaining agreement between HERE, Local 70 and SAC.

On June 19, Skaggs put the recognition agreement into written form and mailed it to O'Chocke. He failed, however, to include anything about Respondent not being bound by the terms of the existing agreement. When O'Chocke received the recognition agreement, he noted Skagg's failure to include Respondent's caveat. O'Chocke thereupon subscribed to the recognition agreement the printed words, ''THE EMPLOYER DOES NOT RECOGNIZE THE PRESENT C.B.A.''[5] He then signed and dated the agreement June 6, 1992, and returned it to Skaggs. Subsequently, Skaggs advised O'Chocke that he agreed with the added language.

Toward the end of June, Joe Borgese, Respondent's director of labor relations, and Skaggs began bargaining toward a new labor agreement. The bargaining was face to face, by mail and by fax and continued through July and into August. Meanwhile, Respondent and the University reached contractual agreement whereby the former would take over the food service operation from SAC.

While the above circumstances where evolving, the UE was in the process of organizing the food service employees at the Wright State University facility and had been in the process of doing so since sometime in 1991. By letter dated July 28, it advised Respondent that it represented a majority of its food service employees but received no reply. The same day, it attempted to file a petition with the National Labor Relations Board, but the individual who mailed the petition neglected to sign it and it was mailed back by the Regional Office the following day.

On and about July 29, SAC employees were advised by their supervisors to proceed, at breaktime, to where Marriott had its offices set up and file applications for employment with Respondent. Certain of these employees were told, when they made application that all SAC employees would be employed by Respondent and that their wages would remain the same. Nothing was said to them about benefits. Employees who were not actually working at the time were advised by mail to come in on July 29 and 30 to fill out applications, tax forms, and other necessary papers for employment with Respondent. When these employees reported to file their applications, nothing was said about benefits.

On July 30, HERE advised its members at Wright State University that Marriott was taking over the food service operation from SAC, that it had scheduled a meeting with Marriott for August 12 and would meet with the membership on August 13 to advise the members of the results of the meeting with Marriott. It assured the membership that health insurance premiums would be paid through August and that more information about coverage after August would be made available at the meeting.

On August 1, Marriott officially began providing food service under its contract with Wright State University. All or most of the SAC employees who were working at the time continued to work for Marriott at the same wages, the same hours, without any break in service. The terms and conditions of the labor agreement between HERE and SAC, then in effect, and not scheduled to expire until October 18, 1992, were not adopted by Respondent nor applied to its newly hired ex-employees of SAC. No deductions were made from paychecks for health and welfare or other benefits. New employees, not previously employed by SAC, were not necessarily offered similar wages but were offered whatever wages management considered equitable.

Although Respondent did not initially announce its position to its employees with regard to the old HERE agreement, they soon learned through the grapevine that they no longer were entitled to the benefits previously enjoyed. Sometimes, in isolated conversations between an employee and a supervisor, the employee was advised that Respondent did not intend to honor the provisions for the SAC contract with HERE. One subject discussed in this manner concerned holiday pay for Labor Day 1992. The inquiring employee was told by her supervisor that Respondent would not pay holiday pay for Labor Day because there was no contract yet in effect. Under the old SAC agreement, employees would receive Labor Day pay in their first paycheck in September after returning from summer break.

In another incident, a UE steward approached management concerning insurance coverage for a unit employee. He too was told that Respondent was not obligated to pay for medical services because there was no contract. For the same reason, Respondent refused to process grievances.

On August 6, the UE timely filed a properly executed petition to represent Respondent's employees at the Wright State University facility. Meanwhile, however, Respondent had continued bargaining with HERE, and on August 7 reached agreement. The terms of the agreement were put in memorandum form that provided that the parties adopt the existing SAC agreement with certain specific exceptions. The exceptions provided for wage increases effective beginning August 1, 1992, a new pension plan and a new insurance (health and welfare) plan also effective as of August 1, 1992. The memorandum of agreement had been negotiated by Borgese and Skaggs and was final insofar as Borgese was concerned. No discussion concerning the necessity of having the agreement ratified by the membership ever took place, neither on August 7 nor at any other time.

After Borgese and Skaggs had agreed on the contents of the memorandum of agreement, Skaggs and O'Chocke signed the document on behalf of the parties. Neither of them dated their signatures. O'Chocke believed that the document was final. Nothing was said about ratification.

On August 10, Respondent received notice that the UE had filed the petition. At the meeting scheduled for August 12, undoubtedly both the memorandum of agreement and the petition were discussed among the members of Respondent's management and Skaggs. It was decided that the memorandum of agreement that was undated, should be backdated and so it was, by both O'Chocke and Skaggs, to July 31, a date prior to the filing of the UE's petition.

On August 13, 50 or more members of Skaggs' local attended the meeting that he had previously scheduled. Skaggs addressed the membership, initially about the insurance that he had obtained in the memorandum of agreement at his August 7 bargaining session. Eventually, one employee-member, Gwendolyn Talbert, asked him if he was reading from a contract. When he admitted that he was, she asked him how he

[5] Collective-bargaining agreement.

could negotiate a contract without first talking with the employees and getting their input. Skaggs became annoyed and said that if the employees did not ratify the contract, they would all lose their jobs. Talbert left the meeting and went to Wilson's office, located close by, and asked him if Marriott would fire the employees if they did not ratify the contract. Wilson replied that he would rather not get involved but that the employees would not be fired for failing to ratify the HERE contract.

Talbert then returned to the meeting and told the employees what Wilson had said. She then called for a vote but Skaggs said he did not want one at that time. He added that all who followed Talbert would lose their jobs. Despite Skaggs' protestations, Talbert asked all of those present who were in favor of ratifying the contract to raise their hands. Only about 10 did so, thus refusing ratification. Talbert was one of several members of Local 70 who had switched allegiance and had become officers of the UE local.

The UE had been advised through its membership about the Local 70 ratification meeting and had instructed the employees to vote against ratification. UE officers had been shown copies of the agreement upon which the employees were being asked to vote and were against ratification because of the circumstances surrounding the negotiations. UE Field Organizer Patricia Ferritto was also instructed on August 13 to write to Wilson to inform him that the UE had been advised that Respondent was in the process of changing insurance and that it was the opinion of the UE that no unilateral changes should be made or negotiated with HERE, Local 70 due to the fact that a question of representation existed. The letter was sent but no response was forthcoming from Wilson.

On August 20, representatives of Respondent, HERE, the UE and the Region met to discuss the question of representation. Skaggs, representing HERE, took the position that a contract bar situation existed. Dennis Painter, representing the UE, took the position that Local 70's 1989–1992 labor agreement was not a bar because the UE had timely filed its petition during the period 60–90 days prior to its expiration date and that the new Local 70 1992 agreement was not a bar both for the same reason and because it was never ratified. The attorney for the Respondent and the representative of the Regional Office agreed with the UE's position, convinced Skaggs to withdraw his objection, and the parties entered into a stipulated election agreement.

On September 3, Respondent conducted a meeting of all employees, both those who had been employed throughout the summer as well as those who had been gone for the summer and who were returning to begin the fall semester. Wilson initially addressed those present, then later each unit manager addressed the employees who worked in his particular unit. Separate unit meetings followed the general meeting.

Wilson described the services that Respondent intended to offer to the customers in general, then each unit manager described, in particular, the service he intended to offer at his unit. At both the general meeting and at certain of the unit meetings, questions were asked by the employees about wages and terms and conditions of employment. The employees were told that they would be receiving the same basic wages that they had received from SAC, credit for seniority, discounts at Marriott establishments and an optical discount, but otherwise, none of the benefits provided under the SAC labor agreement with HERE were promised. Indeed, benefits were not discussed.[6]

The election was conducted on September 18, in accordance with the Stipulated Election Agreement. The UE was victorious and the Region issued its Certification of Representative on September 28. Shortly thereafter, the UE contacted Respondent and arrangements were made to meet on November 4 to undertake collective bargaining. Even before the first bargaining session, however, the UE made clear its position that Respondent was bound by the terms, conditions, and provisions of SAC's collective-bargaining agreement with HERE, and that under that agreement it owed its employees holiday pay for Labor Day 1992 as well as payments to certain employees under the health and welfare insurance provisions of that agreement.

At the initial bargaining session on November 4, the first of seven, the UE's representative reiterated his position that all existing terms and conditions of employment, those contained in SAC's labor agreement with HERE, should remain in full force and effect including the requirement that the employees receive holiday pay for Labor Day 1992. Respondent remained adamant in its position that the labor agreement between SAC and HERE was not binding on Respondent and it was not obligated to pay holiday pay to the employees for Labor Day 1992 because there was no labor agreement between it and the UE in place at the time. It added, however, that it was willing to negotiate holiday pay for subsequent holidays and, in fact, did so at one or more of the seven bargaining sessions at which the parties negotiated.

In rejecting the existence of the SAC-HERE agreement, Respondent announced its desire to negotiate an entirely new collective-bargaining agreement. The UE, however, suggested that negotiations at this first session be limited to an agreement on health and welfare, with other matters to be considered at subsequent meetings. It proposed that the Respondent agree to pay the cost of group insurance for all employees and dependents, apparently beginning immediately. Respondent refused the proposal and insisted that group insurance be negotiated along with all of the other provisions of the labor agreement as those negotiations progressed. Although the UE's written proposal concerning group insurance, offered on November 4, contained no specifics and did not refer to any previous collective-bargaining agreement per se, Respondent's negotiators understood the UE to be requesting that the provisions of the 1989–1992 SAC-HERE labor agreement's group insurance plan remain in effect. This proposal was rejected by Borgese on grounds that that agreement was no longer binding. He offered his own plan, namely company contributions to a carrier. Borgese also showed the UE representatives copies of the original SAC-HERE/Local 70 1989–1992 agreement and of the memorandum of agreement signed by O'Chocke and Skaggs on August 7, either as separate documents or as a single combined labor agreement but conceded that he did not expect them to accept that. As expected, the UE rejected this proposal.

The second bargaining session was held on November 18. Health and Welfare was discussed at this meeting. There was no plan in place at the time. The UE continued to demand that the SAC plan remain in effect. Respondent continued to

[6] Eugene Turner's testimony to the contrary is not credited.

reject this proposal for the reasons previously stated and offered once again its earlier proposal.

Holiday pay was again discussed at the second bargaining session as well as at subsequent sessions. Labor Day 1992 was a subject of discussion. Then, thereafter, after each holiday, Thanksgiving, Christmas etc., the UE would demand holiday pay for the employees, as provided under the old SAC agreement and Respondent would reject the demands on grounds that Respondent had no obligation to pay under the provisions of the old SAC agreement that was no longer in existence.

The third bargaining session was held on December 10. Neither health and welfare nor Labor Day pay were discussed or, at least, not agreed upon. Other proposals were, however, discussed and agreed upon.

The fourth bargaining session was held on December 21. Respondent offered to increase its contribution to any health insurance carrier the UE should decide upon incrementally from $94 per month upon ratification of any collective-bargaining agreement to $123.26 per month by August 1, 1994. The UE did not accept this proposal. Holiday pay was again discussed including pay for Labor Day and Christmas 1992. Respondent, however, refused payment for these days and no agreement was reached. The UE proposed a new bereavement pay provision which Respondent accepted. Respondent suggested that the newly proposed provisions be included in the labor agreement as previously agreed upon by Respondent and HERE and taken to the UE local membership and voted upon. The UE rejected Respondent's suggestion and requested further negotiations.

The fifth bargaining session was held on February 24.[7] Health and welfare and holidays were again discussed. The UE proposed a short-term disability plan that provided $475 per week for a 26-week period and life insurance of $2000 per employee. The Respondent countered with an offer of $70 per week for 26 weeks and agreed to the $2000 life insurance. During the same meeting, it subsequently increased its offer to $100 upon ratification of the labor agreement with increases to $127.65 as of 9/25/93 and $146.80 on 9/25/94. The UE rejected Respondent's offer. With regard to holiday pay Respondent again refused pay for Labor Day 1992. It did agree, however, to some paid holidays.

The sixth bargaining session was held on March 10. Health and welfare was discussed at this meeting but there was no substantial change in the position of either party.

The seventh and final negotiation session was held on April 21. Health care contributions were discussed. Respondent again offered the same contributions proposed at the two previous sessions but added $50 per month increased coverage to single plus dependent employees hired prior to August 2, 1992, and $100-per-month increased coverage to family employees hired prior to August 2, 1992. The UE did not accept this amended offer.

Later during the meeting of April 21, Respondent again amended its health and welfare proposal by offering to extend the coverage to employees on summer layoff, thus proposing coverage over a 12-month period. Additionally, instead of simply offering to make the designated contributions to the carrier of the UE's choice, Respondent agreed to administer the plan. The UE agreed to take this amended health and welfare proposal back to the membership for consideration and possible ratification.

Holiday pay was discussed during the April 21 session. Inasmuch as retroactivity was negotiated and fixed at September 25, 1992, for the entire agreement, the UE effectively abandoned its claim to holiday pay for Labor Day 1992.

Although the testimony does not reflect specifically at which meetings the subject of students doing unit work was discussed, nevertheless the record is clear that this subject came up at one or more of the bargaining sessions. With regard to this matter, there were discussions concerning the definition of a student, whether students should be included in the unit and how many hours students should be permitted to perform unit work. The UE took the position that students should not be included in the unit and should not be permitted to perform over 16 hours of unit work per week. Respondent agreed to the exclusion of students from the unit but took the position that they should be permitted to perform up to 20 hours of unit work per week.

Agreement was reached on April 21 and no additional bargaining sessions were scheduled. It remained only for the collective-bargaining agreement to be put into final form and ratified. With regard to the matters here in contention the final agreement contains the following provisions (not cited verbatim):

> Health and welfare—The provisions as agreed to by the parties on April 21 effective April 26, 1993, the soonest possible date for the first contributions.
>
> Holidays—The employees were to receive 10 paid holidays including New Year's Day, Labor Day, Thanksgiving Day and the Friday after Thanksgiving, Christmas Eve and Christmas Day. Since it had been negotiated that the labor agreement was made retroactive only to September 25, 1992, the employees were not entitled to holiday pay for Labor Day 1992. The agreement was to remain effective through September 24, 1995.
>
> Students—As negotiated, students were excluded from the bargaining unit and the number of hours that they would be permitted to work, on a regular basis, limited to 20 hours per week.

On May 4 the new labor agreement was ratified by the membership.

To summarize the above facts, the record reflects that Respondent learned in March 1992 that the employees at the Wright State facilities were represented by HERE. It obtained a copy of the existing contract between HERE and SAC, analyzed that contract and determined which provisions it could accept and which it could not accept. It immediately contacted HERE and advised its representative about which of the contract's provisions it had objections, thus opening negotiations on a new labor agreement and, at the same time, advising the employee's representative that it did not intend to adopt the existing collective-bargaining agreement as it stood.

Subsequently, Respondent agreed to hire the existing work force represented by HERE, recognize HERE as its collective-bargaining representative, and engage in negotiations with regard to the provisions in the existing collective-bargaining agreement to which it objected. Thereafter, Respond-

[7] Hereinafter all dates are in 1993 unless noted otherwise.

ent recognized HERE as the collective-bargaining representative of the employees, rejected the existing labor agreement and entered into negotiations with HERE for a new agreement. In the meantime it refused to adopt the old SAC-HERE collective-bargaining agreement or to give effect to its provisions as they affected conditions of employment.

Respondent, negotiating in good faith with HERE, reached accord with it and executed a collective-bargaining agreement, not aware that the UE had timely filed a proper RC petition. When Respondent learned of the filing of the UE's petition and the employees' refusal to ratify the new HERE collective-bargaining agreement, it properly refused to give effect to its provisions and quickly entered with the other parties into a stipulated election agreement.

When the UE won the representation election and was certified as the exclusive representative of Respondent's employees, it immediately entered into negotiations to bargain toward a new collective-bargaining agreement. The seven bargaining sessions that culminated in eventual agreement proceeded with no evidence of bad faith on the part of Respondent despite numerous unfair labor practice charges filed by the UE.

III. THE 8(A)(5) AND (1) ALLEGATIONS

The *Burns*[8] decision stands for the proposition that while successor employers may be bound to recognize and bargain with an incumbent union, they are not bound by the substantive provisions of a collective-bargaining agreement negotiated by their predecessors but not agreed to or assumed by them. I find that the circumstances of the instant case require application of the *Burns* decision.

General Counsel cited several cases[9] in support of the argument that Respondent in the instant proceeding should be excepted from the general rule in *Burns*. The cases cited by General Counsel, however, all differ factually from the case here being considered in that in each of them the successor employer refused to recognize and bargain with the exclusive collective-bargaining representative of its employees. Inasmuch as that is not the situation here, the cited cases are clearly inapposite.

Inasmuch as I have found that the *Burns* doctrine is fully applicable to the facts of the instant case, I consequently find that the Respondent, as successor employer to SAC, was free to establish its own terms and conditions of employment and by doing so did not violate Section 8(a)(1) and (5) as alleged in paragraph 18 of the complaint. Paragraphs 18(a)–(h) are dismissed.

IV. THE 8(A)(3) AND (1) ALLEGATIONS

A. *The Layoff of Russell Lober*

Russell Lober was working on the night shift as a general utility employee from 3 p.m. to 11:30 p.m. in the Rathskeller part of Respondent's facilities in October 1992 when Respondent was notified of his appointment as a steward. Since there was no contract in effect at the time of his appointment, there was no grievance procedure and Respondent therefore refused to accept grievances from any of the stewards. There is, however, no evidence that Lober ever attempted to file a grievance either on behalf of himself or any other employee. Basically, he was steward in name only.

Lober returned from vacation on or about January 8, 1993. On January 15, Steve Anders, Lober's supervisor, told him that he was being laid off for lack of work. Lober was one of four or five employees laid off in January. There had been no layoffs between August and December 1992.

Before any of the unit workers were laid off, Tom Wilson called in Gwendolyn Talbert, president of the UE local, to advise her of his intention to lay off campuswide and cut hours. With regard to Lober, Wilson explained that he was eliminating his general utility position because other employees could work together to get his work done. Talbert asked about the possibility of the laid-off employees bumping campuswide, a right which they had enjoyed under the SAC contract. Wilson explained that since there was no contract in effect at that time, the employees had no bumping rights. He added, however, that he would allow employees to use their seniority to displace less senior employees from their jobs. In the case of Barbara Wilson, one of the four employees being laid off at the time, he stated that he would permit her to use her seniority to keep working.

In a subsequent meeting attended by Tom Wilson, Talbert, and Barbara Wilson, the three discussed the latter's pending layoff. Upon being advised that she would be allowed to bump into a lower classification, Barbara Wilson told Tom Wilson that she would have to think about it. Thereafter, however, she decided to bump a junior employee and, in fact, did so. Barbara Wilson, who had worked in Talbert's section, was not replaced. Tom Wilson instead told Talbert that she would no longer need Barbara as her helper, that she could do the job herself because he was thereafter going to have vegetables brought in to her already precut and that would save time.

In Talbert's initial meeting with Tom Wilson, she asked him why Michael Hart, the third laid-off employee, was having his position eliminated. Wilson explained that Hart's general utility position which consisted of cleaning tables and emptying trash could be done by other employees taking turns doing that.

Lober testified that January is a busy time of the year for the food service facilities at Wright. His testimony was supported by that of other witnesses who also testified that historically there were no layoffs at that time of year. Nevertheless, when Lober visited the facilities about a week after his layoff, he found that he had not been replaced. Rather, he found that his duties were being performed by supervisors.

During this visit, Lober asked Tom Wilson if he could bump a junior employee to obtain a job. Wilson replied that there were no bumping rights because there was no contract in effect. Despite the reluctance of Respondent's witnesses to use the term ''bumping'' it is clear that seniority was used to permit a laid-off employee to displace a junior employee, assuming he was capable of doing the junior employee's job.

On or about January 22, Lober again visited the Wright facilities and noticed a job posting for a cashier at Allyn Hall. He applied for the job by signing his name to the notice below that of two other applicants. Two others subsequently signed their names below his. All were members of the bargaining unit. Sometime thereafter, he asked a supervisor, Todd Kimmel, if he had gotten the job. Kimmel re-

[8] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[9] *U.S. Marine Corp*., 293 NLRB 669 (1989); *American Press*, 280 NLRB 937 (1986); *Spruce Up Corp*., 209 NLRB 194 (1974).

plied that he had not because he had no cashier experience. Lober testified that he had, in fact, been a cashier in the Rathskeller, another part of the Wright University facility, and had noted this fact on his application.[10] However, Lober admitted that at least some of the employees who signed the notice had greater seniority than he did and that he had been told on one or more occasions when he applied for posted jobs that he did not get the job because he did not have enough seniority. Lober did not question this explanation.

On May 13, Lober applied for general utility positions at the bike shop and University Center. He was recalled on May 24.

The complaint alleges that Lober was laid off because he formed, joined, or assisted the Union and engaged in concerted activities. Although he was appointed steward and Respondent was advised of his appointment in August 1992, the record contains no evidence that Lober was ever active in that capacity. He presented no grievances and had no discussions or conversations with management on behalf of employees in the unit. He participated in no organizational work on behalf of the UE because none was necessary; recognition was voluntary.

The five officers of the UE local were more active than Lober in that they all participated to a greater or lesser degree in the collective-bargaining process on behalf of the UE and all signed the labor agreement which resulted from this activity. Some of these UE officers were heavily involved in activity critical of Respondent as were certain rank-and-file employees, particulars discussed infra, and none of these employees were laid off because of these activities, though Respondent was well aware of them. I conclude that the General Counsel has failed to prove that Lober was laid off for discriminatory reasons, as alleged. Consequently, I recommend dismissal of this allegation.

B. *The Layoff of Eugene Turner*

The UE notified Respondent in October 1992 that Eugene Turner had been appointed steward along with Lober and Hart. Inasmuch as there was no contract in effect at the time, Respondent recognized no grievance procedure per se and Turner, like Lober, was a steward in name only. Any contact between management and the UE necessitated by events impacting on unit personnel was between a member of management and the UE's local president, Gwendolyn Talbert.

Between August 1, 1992, when Respondent took over the food services facilities at Wright and the following January, Respondent concluded, based on business considerations, that certain positions should be eliminated. The number of positions to be eliminated was four. Before notifying the employees to be affected by the elimination of jobs, Wilson contacted Talbert to discuss with her the procedure to be followed. He told her that there were two positions at the University Center and two more in the Rathskeller that were to be eliminated and that she should contact the employees upon whom the job elimination would impact and they would sit down and discuss it with them. He identified one as Eugene Turner who was to be laid off because he was the grill cook with the least seniority. Turner had been employed by SAC only since April 1992.

[10] General Counsel did not offer Lober's application to support his testimony. Respondent did not offer it to undermine it.

Meanwhile, Todd Kimmel, Turner's supervisor advised him that he was being laid off for an indefinite period of time. Turner testified that the workload at the time was heavy, that he was working a 40-hour week with occasional overtime.

After Kimmel told Turner of his layoff, he was instructed to attend a meeting with Wilson and Talbert. At the meeting, Wilson told Turner that, if he chose, he could displace a junior employee in another classification rather than be laid off. Turner replied that he wanted to think about it and would get back to them. Later he declined the opportunity to bump because the new job would pay less and because he did not want to put someone else out of work. Other employees were not as generous as Turner and did bump junior employees out of their jobs.

After Turner's layoff, he observed another unit employee, Pat Moyer, performing some of the duties that he had performed as grill cook.

On May 21, Respondent posted an opening for a cook's job at the University Center. Someone called Turner and told him about it. He came to the facility but was told by a Marriott official that he would have to take a test. He objected and so did the UE on his behalf on grounds that it was unnecessary and no one else had had to take a test. He nevertheless applied for the job. Subsequently, Kimmel called him and asked if he was ready to return to work. He said he was and reported on June 14.

With regard to the allegation that Turner was laid off for discriminatory reasons, I find the record devoid of substantial evidence. He was appointed steward in name only. He was totally inactive. There were several UE local officers and other stewards as well as rank-and-file employees whose activities on behalf of the UE were far greater than Turner's. These were known to members of management and some were openly criticized but none of these employees were laid off.

Respondent's reason's for eliminating Turner's position were grounded on economic considerations, his duties were given to another unit employee, and he was offered another position with Respondent but voluntarily refused to displace a fellow employee. I fail to see how Respondent could gain anything by laying off a steward because of his union activity only to offer him another position which would not affect his stewardship or his union activities. I recommend dismissal of this allegation.

C. *Verbal Warning to Bonita VanZant*

The complaint alleges that Respondent violated Section 8(a)(3) and (1) by issuing a verbal warning to Bonita VanZant for discriminatory reasons.

Before Bonita VanZant left to go on maternity leave in October 1992, she worked behind the grill line putting up hamburgers, then out in the dining area, wiping trays. For a couple of hours in the evening, one week, she ran the cash register. When she ran the register, she did not give receipts to the customers.

While Bonita VanZant was away on leave, a member of management noticed that customers were walking out without paying for their food. He therefore told Joan VanZant and other employees operating cash registers to start giving out receipts.

When Bonita returned from maternity leave on January 25, she started working as a cashier. She was instructed at that time to give receipts to the customers. When lines of customers would form during the luncheon rush hour, and she was very busy, she would forget to give receipts. Ron Simco reminded her of the new policy but she would nevertheless forget to give receipts with each purchase. When she was given a verbal warning for failure to comply with the new policy, she signed the verbal warning slip, apparently without comment.

I find the record totally devoid of any evidence to support the allegation. It is, consequently, dismissed.

D. *Elimination of the Breakroom*

The complaint alleges that Respondent violated Section 8(a)((1) and (3) of the Act when it eliminated the employees' breakroom because they had engaged in protected concerted union activities. In its answer, the Respondent admits that it eliminated the breakroom but denies that it did so for reasons violative of the Act.

The record reveals that when SAC was operating the food service facilities at Wright University, it maintained a stockroom in the bike shop with shelves located up against the four walls for the storage of equipment and supplies for it and for other food service facilities run by the operator. At some point, the record is silent as to the circumstances,[11] tables were placed in the center of the stockroom and the SAC employees began to use it as a breakroom. There were three tables there and all or almost all of the employees used them for their breaks.

When Respondent took over the operation of the food services facilities in August 1992, it continued the use of the stockroom for storage and the employees continued to use a part of it as their breakroom. With the expansion of the facilities, however, and the increase in the number of food service entities, a new Taco Bell restaurant, for example, need for expanded storage space became evident. To fulfill this need, Respondent, between January and March 1993, removed the tables from the stockroom, thus eliminating the breakroom part of it, and in their place installed new shelving on which additional supplies and equipment were placed for storage.

When the employees at the Bike Shop returned from spring break, on or about March 29, and found that their breakroom had been eliminated, Joan VanZant, the UE local's recording secretary and Ima Turner, a steward, asked Ron Simco about it. Simco explained that it was Marriott policy not to permit employees to eat in stockrooms. He suggested that employees take their breaks out in the cafeteria dining area.

The employees subsequently used the dining room for their breaks. This proved unsatisfactory, however, because some breaks occurred during the busiest periods of the day when seating was limited or unavailable and because while the employees were taking their breaks in the dining room, customers would approach them to make requests or just to talk, thus interrupting their rest period. As a result of the problems with taking breaks in the dining room, VanZant again approached Simco and asked if he could set aside a table with a sign, ''For Employees Only,'' but he refused on grounds that there was not enough table space for the students as it was. Due to the problems connected with taking their breaks in the dining room, very few of the employees did so. Rather, they ate their lunch or took their breaks outside the building, sometimes in their cars. Eventually, the employees were provided with a small locker room in which to take their lunch and breaks.

I find that the allegation in the complaint that the breakroom was eliminated in retaliation for the employees' protected concerted and union activities is unsubstantiated by the evidence. General Counsel's brief contains the suggestion that Respondent eliminated the breakroom ''in an effort to enforce its union talking ban. This too, I find unconvincing. There is no evidence that employees discussed the Union in the breakroom. If they did, there is no evidence that management overheard them. If they were overheard, there was no statement to that effect and no prohibition against their continuing to do so. If, in fact, Respondent did not want its employees to discuss the Union, how would eliminating the breakroom and forcing the employees to take their breaks in the dining room, outside the building, in their cars or in a smaller breakroom accomplish this. Finally, inasmuch as Respondent had already recognized the UE and was deep into bargaining in good faith with its negotiators toward a binding collective-bargaining agreement, why would it object to its union employees discussing union matters if the discussions were during their breaks and not interfering with their job performance.

I find that the section of the stockroom used by employees as a breakroom was converted to a storage area because Respondent needed the space for legitimate business reasons. Its conversion was not motivated by purposes violative of the Act. I recommend dismissal of the allegation.

V. THE INDEPENDENT 8(A)(1) ALLEGATIONS

A. *The Removal of UE Notices from Bulletin Boards*

As noted in earlier sections of this decision, from the very first, Respondent made clear to all parties, to HERE, to the UE and to any employees who might inquire, that it would not be bound by the provisions of the initial SAC-HERE collective-bargaining agreement. The UE, from its very first contact with Respondent, was equally adamant in its position that until a new agreement was reached, Respondent was bound by the provisions of that agreement as well as existing working conditions, in particular the existing health plan and holiday provisions.

In order to publicize its position with regard to these matters and to obtain the support of the employee-members and the public in general, the UE began to distribute literature and post notices in keeping with its position on employee bulletin boards at the worksite and on student bulletin boards around campus.

The posting of notices was undertaken with the apparent permission of the UE International by direction of the UE's local recording secretary, Joan VanZant. One or more stewards including Ima Turner did the actual posting, beginning

[11] There was no provision for a breakroom in the labor agreement between SAC and HERE.

in early October 1992.[12] There was no objection to the initial posting of the notices either from the University or from the Respondent.

On one occasion in early October, Turner posted a notice bearing the message:

> TOGETHER WE CAN TURN THINGS AROUND
>
> WE HAVE A RIGHT TO THE PAST STANDARDS OF OUR WORKING CONDITIONS UNTIL A NEW CONTRACT IS SIGNED. IF MARRIOTT MAKES ANY CHANGES IN HOURS, WAGES, BENEFITS, SCHEDULES, OR WORKING CONDITIONS, SEE YOUR STEWARD AND FILE A GRIEVANCE NOW. IT IS YOUR RIGHT AND RESPONSIBILITY!

Turner testified that Ron Simco removed this message from the bulletin board but did not describe the circumstances or state that she actually saw him do it. Simco testified credibly at the hearing that he had never seen this document before.

On October 12, Turner posted a UE notice dated October 9 entitled, ''UE Local 792 Update,'' bearing the message:

> IMPORTANT INFO.
>
> QUESTIONS have been raised regarding our existing benefits and working conditions. The benefits of Company Paid Health Insurance, a Grievance Procedure, Paid Holidays and receiving a decent amount of working hours, have been earned by all of us. Marriott has no right, by law, to start making unilateral changes in the terms and conditions we have rightly earned.
>
> WHAT DOES THE LAW SAY:
>
> Section 8(d) of the National Labor Relations Act (NLRA) states that an employer and the representative of its employees are required to meet at reasonable times, to confer in good faith about certain matters. The parties must ''confer in good faith with respect to wages, hours, and other terms or conditions of employment, or the negotiation of an agreement or any questions arising thereunder'' an agreement. Section 8(d) further provides that where a collective-bargaining agreement is in effect no party shall end or change the contract unless the party wishing to end or change it notifies the other party in writing about the proposed termination or modification.
>
> THE BOTTOM LINE:
>
> The employer can not lawfully make unilateral changes without negotiating with the UE.
>
> Therefore all existing terms and conditions should remain in full effect. If they do not, we should file grievances protecting our benefits. Lets not let Marriott take our benefits from us without a fight. They have no right, by law, to take the terms and conditions of our employment that we have earned. By LAW, WE DO HAVE A RIGHT TO THOSE TERMS AND CONDITIONS WE WORK SO HARD FOR EVERY DAY. THEY HAVE BEEN, AND WILL CONTINUE TO BE PART OF OUR WORKING CONDITIONS!!!

Ima Turner testified generally that she had occasion to see Ron Simco and Supervisor Pam Daniels remove union literature which she had posted on the bulletin boards. She testified more specifically that she posted one document ''about the labor laws . . . saying that we had a right to expect what we'd always had in the past.'' She testified, ''That one was took down because Ron considered it an attack on the Marriot corporation.'' According to Turner, Simco told her this during a discussion about the document that took place in his office and during which he also stated that he took it down because it did not pertain to union business.

Joan VanZant credibly testified that Simco also admitted to her that he had removed this document from the bulletin board.

With regard to this particular document, Simco denied that he had discussed it with Wilson. He also testified that he did not consider it derogatory nor defamatory, thus implying that he had not removed it from the bulletin board.

Wilson testified that he had received a copy of this document from one of his managers and agreed that it might have been in October. He could not, however, recall which of his managers brought it to his attention or that he authorized its removal. At the time of the hearing, he admitted that he probably would have had it removed because it stated, in part, ''Lets not let Marriott take our benefits away from us without a fight. They have no right, by law, to take the terms and conditions of our employment that we have earned.'' Wilson explained his position by stating that the document was not complimentary to the company, expressed an opinion, and was not a notice of a meeting or a newsletter. It was therefore subject to removal.

From the totality of testimony, I conclude that this particular document was posted by the UE and removed by Respondent.

Sometime before January 1993, the UE posted a 2-page notice folded like a greeting card. On the cover page was a cartoon of a member of Respondent's management addressing four of its employees. He is saying, ''As Associates, We'll take care of you. '' Above the cartoon is the question, ''Does This Sound Familiar?'' Below are the directions, ''Open to see how.'' When opened, on the second page, is another cartoon. Pictured are the same four employees with a single long industrial screw penetrating all of them through their stomachs. Walking away from them is the same member of Respondent's management. With a smile of satisfaction on his face and a giant screwdriver on his shoulder, he is saying, ''That's a real big one.'' The head of the screw bears the legend ''Health Insurance'' and the screwdriver, ''Associate Screw Tool.'' The message is clear.

This UE notice was posted by Turner on the bulletin board because of the importance of the health insurance issue. It was removed before January. Simco admitted that he removed it or had it removed after discussing its content with Wilson and obtaining his concurrence in the decision to have it removed because it was derogatory. He testified that the cartoon implied that management was ''screwing the employees by using health insurance as a bargaining chip.''

[12] Hereinafter, once again, dates are in 1992 unless noted otherwise.

In January 1993,[13] Turner posted another piece of UE literature. Its message:

> HEALTH CARE-PAY INCREASE
> HEALTH CARE-PAID HOLIDAY
> JUSTICE FOR CAFETERIA WORKERS

Turner testified that Simco removed copies of this poster on January 5 and 6. Circumstances of its removal were not described by Turner and she did not state that she actually saw Simco remove the document. Simco testified that he did not discuss this particular document with Wilson as he had other notices and did not consider it derogatory. By implication, he denied removing this document from the bulletin board. Simco is credited.

The UE posted another notice in February bearing the message:

> Take good care of your employees and they'll take good care of the customers.
>
> J. W. Marriott Sr.,
> founder of Marriott Corp.
>
> ? ? ? ? ? ? ? ? ? ? ? ? ?
>
> The Marriott Corporation likes to use this quote in its brochures. Unfortunately, Marriott Corporation doesn't follow this advice.
>
> Marriott took over running the food service at Wright State University in August 1992. There has been nothing but trouble for the food service employees ever since. Marriott has taken away all workers' health insurance, refuses to pay holiday pay, has taken workers' jobs away, and has engaged in a whole host of other unfair management practices. On top of this, Marriott illegally refuses to talk with WSU food services workers' union, UE Local 792, to work out an agreement at the negotiating table.
>
> Please don't sit by in silence and allow this injustice to continue. Tell a cafeteria worker that you support this struggle, and ask what you can do to help, or call the number below.

Turner testified that this notice was removed in February by Simco. She admitted that she did not personally see him remove it but asked him if he had done so. She testified that he admitted that he had, in fact, removed the document and would continue to do so where the notice in question had nothing to do with scheduling union meetings but rather attacked the Marriott company. Joan VanZant testified that she was present on this or another occasion when Simco admitted to Turner that he had removed UE notices from bulletin boards.

Simco testified that he discussed this February notice with Wilson. He advised Wilson that in his opinion the notice was derogatory and recommended that it be removed. It was.

Sometime after March 30, the UE posted a notice entitled ''Wright State University Endorses Illegal Conduct.'' It stated in part, ''When Marriott started in August 1992, they eliminated the health insurance, holiday pay, bereavement pay and other benefits on which the hard working cafeteria workers and their families depended.'' This document was removed by the Respondent from the bulletin board after a discussion between Wilson and one of his managers because Wilson considered it disparaging and harmful to Wright State and Marriott.

The above-described incidents of alleged and sometimes admitted removals of UE literature from bulletin boards reflect a specific pattern which Respondent admittedly attempted to follow. Wilson testified that when the UE first began to post its notices, flyers, and other documents in late September or early October 1992, he had one faxed to Borgese and asked him for legal guidelines as to what kinds of documents he could and could not allow to remain posted. Borgese replied that memos, newsletters, and announcements of meetings should be kept on the bulletin boards while documents or flyers which were disparaging or harmful to Marriott could be removed. Subsequently, Wilson relayed this bulletin board policy to his various managers who, in turn, relayed it to any employees or UE stewards or officers who inquired. Respondent followed the policy suggested by Borgese throughout the relevant period and still does.

Applying relevant case law to the situation described above, I find that

> It is well established that there is no statutory right of employees or a union to use an employer's bulletin board. However, it is also well established that when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices or discriminate against an employee who posts notices, which meet the employer's rule or standard but which the employer finds distasteful.[14]
>
> The Labor Management Relations Act does not afford a protectable interest in the use of an employer's bulletin board. . . . Nevertheless, where, by policy or practice, the company permits employee access to bulletin boards for any purpose, Section 7 of the Act, 29 U.S.C. section 157, secures the employees' right to post union materials. . . . The content of such notices is protected by the Act even if abusive and insulting.[15]

The case law cited supra applies to similar situations arising after an employer's recognition of a union and before the execution of a collective-bargaining agreement.[16]

Based on the above-described statement of facts and applicable law, I find that Respondent violated Section 8(a)(1) of the Act by its removal of UE notices from the bulletin board.

[13] Hereinafter, all dates are in 1993 unless noted otherwise.

[14] *Container Corp. of America*, 244 NLRB 318 (1979), as cited in *Union Carbide Corp.*, 259 NLRB 974 (1981), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983).

[15] *Union Carbide Corp. v. NLRB*, id. Exceptional situations described in the cited case are not present in the instant case.

[16] *NLRB v. Proof Co.*, 242 F.2d 560 (7th Cir. 1957).

B. *The Issuance of the Warning Memorandum to Employees for Participating in a Union (UE) Rally*

Sometime after January 1, the UE decided to hold a series of rallies to bring to the attention of students and employees of Wright State the problems it was having with Respondent. The first rally was scheduled for January 28 and was to take the form of a peaceful march over a predetermined route on campus. The UE's member-employees were to participate joined by members of other UE locals and students. Picket signs were prepared for the march.

On January 28, the rally took place without any problems. Between 25 and 30 people participated. The march was witnessed by members of the media and of Wright State's public safety division. There was coverage and reporting of the rally by both television and newspapers with no mention of any violence or unpleasant incidents.

On the morning of January 31, Wright State's liaison with Respondent contacted Wilson and told him that Harold Nixon, Wright State's vice president of student affairs, had instructed him to inform Wilson that there was a policy outlined in the ''Wright Way'' policy manual that required that any group wishing to host a rally on campus would have to fill out a form requesting permission to hold the rally and submit it at least 48 hours in advance of the day the rally was to take place. Wilson was assured that the University was not objecting to the rally, per se, but only to the failure to fill out the necessary form in timely fashion. Wilson immediately obtained a copy of the policy manual.

As a result of his telephone communication with Wright State's liaison officer and his subsequent reading of the policy manual, Wilson, the same day, drafted a letter to all of the union employees explaining the University's policy. Since O'Choke was present on campus that day, Wilson asked him to review the letter. O'Choke did so. A copy of the letter was then faxed to Borgese.

Wilson's letter of January 31 initially stated:

> Wright State University and Marriott Corporation support the right of free speech for its associates. Marriott Corporation and its associates are a guest on the campus of Wright State University and are expected to abide by the rules and regulations as described in Wright State's ''Wright Way'' policy manual.
>
> I have been instructed by Wright State to inform you that the demonstration that was held Thursday, January 28, 1993 was a gross violation of Wright State University policy due to the fact an appropriate permit was not filed.

This was not, however, the final form of Wilson's letter because when Borgese received his faxed copy, he added the following paragraph and apparently faxed it back to Wilson immediately:

> I need to inform you at this time that any violation of Wright State policy will not be tolerated in the future and that continued unwelcomed and wanton harassment of Faculty, Staff, Students, other customer, and other associates will equally not be tolerated. Any future violation will result in disciplinary action up to and including termination with Marriott Corporation.

Upon receipt of Borgese's paragraph, Wilson did not understand why that language was there. Nevertheless, he added it to his letter and made arrangements to meet with Talbert and Bert Lyles, the chief steward, later that day, to discuss Wright State's policy vis-a-vis rallies. He also made copies of his/Borgese's letter and supplied them to one or more of his managers for immediate distribution to the employees.

The second rally was scheduled to take place on January 31, the same day that Wilson was first informed of the Wright State policy. When he called Talbert and Lyles into his office to discuss the matter, he informed them that he knew they intended to hold a rally that day, then told them about the call he had received earlier that day. He outlined the procedures required by the Wright State policy regarding rallies. He assured them that the school had no problem with them rallying as long as they filled out the proper forms in a timely fashion.

He then asked Talbert and Lyles to sign copies of the letter that he and Borgese had written on the subject. He explained that signing the letter did not mean that they agreed with it but only that they understood what it was about. With that in mind they both signed copies.

While Talbert and Lyles were in Wilson's office, Todd Kimmel was passing out additional copies of the Wilson/Borgese letters to other employees. As he was doing so he was instructing them to sign the letters and warning them that if they did not do so they would probably be fired. When Talbert left Wilson's office, these employees approached her and told her what Kimmel had said to them. Talbert thereupon returned to Wilson and told him what Kimmel was saying to the other employees. She requested that Wilson inform Kimmel that the employees would not be fired for refusing to sign the letter. Wilson complied with Talbert's request.

Ima Turner participated in the first rally on January 28. She was one of the employees told by her supervisor, Ron Simco in her case, to read and sign a copy of the Wilson/Borgese letter. At first she was not going to sign the letter but then got the impression that she would have to sign the letter if she wanted to keep her job. Turner testified that she understood the letter to mean that she was not to participate in any more rallies.

Karen Bahow, a UE field organizer, testified how other employees came to her to express concern about their participation in further rallies. One, Barbara Armstrong, told Bahow that once she had signed the letter, she felt she was bound by it. Fearful of retribution. Bahow canceled the rally scheduled for that day.

Following the cancellation of the rally, Bahow and Field Organizer Shane Carlin contacted and met with Nixon's administrative assistant, Denise Clark, to determine what the University's policies were with regard to rallies and obtained a copy of its policies on the subject. Bahow advised Clark that she had received no complaints from anyone about the conduct of the participants in the rally and asked her if she had heard about any. Clark assured Bahow that there were none and that all the University was seeking was prior notification.

There were one or two rallies after January 31, in early February, but not as many employees participated as in the

first one. Ima Turner estimated the number as 12 and 15 participants, all of whom obtained permits in a timely fashion.

Respondent's letter of January 31 clearly targets the January 28 rally and march as its subject. It states that ''continued unwelcomed and wanton harassment of Faculty, Staff, Students, other customers and other associates will not equally be tolerated. Any future violation will result in disciplinary action up to and including termination with Marriott Corporation.'' There is, however, no evidence that any incidents of ''unwelcomed and wanton harassment'' occurred during the peaceful informational picketing of January 28. Therefore, the threat of disciplinary action up to and including termination must, of necessity, refer to the picketing. Peaceful informational picketing as occurred on January 28 in the instant case is a protected activity. To threaten employees with discipline and possible termination for engaging in protected concerted activity is a violation of Section 8(a)(1) of the Act. Likewise, to falsely accuse employees of engaging in unwelcomed and wanton harassment and threaten them with discipline including termination if they should continue to engage in such activity is similarly a violation of Section 8(a)(1) of the Act.

C. *Telling Employees that They Are Not Allowed to Engage in Discussions Relating to the Union (UE)*

Thomas Wilson testified concerning Respondent's policy with regard to solicitation. He stated that groups and organizations are not permitted to solicit individuals during worktime while they are working. For example, Respondent does not permit the sale of girl scout cookies during worktime in work areas. During lunch or break periods in areas set aside for employees to take their breaks or in areas generally open to the public, soliciting, for example, for orders for Avon products, is permitted. No such solicitation is permitted in the work environment areas however—in the back, in the kitchen areas or in the line areas—areas where only employees are permitted, not the public.

Pam Daniels, an admitted supervisor, testified that employees, while they are working, performing their assigned tasks, are free to talk to each other but are not allowed to talk about union business. She admitted telling employees many times that they could not discuss the Union during working time.

Employee Linda Hunter testified that at least on three different occasions Daniels prohibited her from talking about the Union while working. The first occasion occurred just before the collective-bargaining agreement was signed, perhaps in March 1993. She was at work, about to go through the gate to the kitchen. She had a cart as did several other employees also trying to pass through. As each was waiting for the other to get through the door, a brief 1- to 2-minute discussion about the Union took place. Hunter was talking to employees Joan VanZant, Jerry Atkins, and Ima Turner when Daniels[17] told them that they were not allowed to talk about union matters while they were working. She said nothing about union talk while on breaks.

The second occasion occurred after Hunter had just clocked out on break and was having a cup of coffee at Joan VanZant's workstation while the latter continued working. They were discussing union matters when Daniels walked through. After Hunter clocked in after her break, Daniels called her into the office where Ron Simco was also situated. Daniels told Hunter that she was not allowed to talk about union business. When Hunter protested that she had been on break, Daniels pointed out that VanZant had not been on break. Later, Daniels commented to VanZant that her working area was a union conversation place.

The third incident occurred while Hunter was busy pouring milk into coolers. While working she was talking to another employee about the Union. Daniels had been standing behind her and called her over. She told her that she was not allowed to talk about ''union stuff.'' Hunter objected stating that her talking about the Union did not hinder her work. She told Daniels, ''When you tell me that I have to shut up and can't talk at all, you're messing with the Constitution of the United States; you're telling me that I can't have my freedom of speech; I'm not going to stop talking about it.'' VanZant witnessed and testified to the content of this discussion. Thereafter, VanZant, Hunter, and the other employees continued to discuss union matters while working. No one was disciplined for doing so.

Ima Turner credibly testified concerning another incident wherein she was told by a Marriott official not to discuss the Union. On this occasion she had been generally discussing the UE with employees Judy Hall, Linda Hunter, and Georgia Pebbles while working in the kitchen of the bike shop. Daniels was present and said, ''Ima, you know you're not supposed to be discussing union while you're working.'' Turner responded that as long as it did not affect her work, she did not see how it made any difference what subject she talked about. Turner explained that employees had always been permitted to talk while working. Clearly, it was the subject of the discussion that bothered Daniels.

In its brief, Respondent deals with this allegation as though it has something to do with no-solicitation rules. It does not. It has to do with the Respondent banning union talk among employees during working time while permitting all other forms of shop talk politics, religion, sports, etc. This is clearly an infringement of the employees' Section 7 rights and a violation of Section 8(a)(1) of the Act.[18]

D. *Respondent Told Employees that Before Respondent Would Fill Jobs with Union Employees, It Would Close Down Its Operation*

This allegation has to do with a portion of Respondent's business called the war wagon or warrior wagon. The war wagon is a mobile cart which is loaded with various types of food and drinks and taken outside during certain months of the year in good weather to service the public. The war wagon was introduced by Respondent in October 1992 and was operated from the beginning by a cashier, a unit employee, helped during the busy luncheon period and relieved during break periods by a student.

The first cashier to operate the war wagon was Lisa Center, a full-time employee and member of the UE. Center operated the war wagon from October or November 1992 through April 1, 1993, her last day. Center left the employ of Respondent that day without giving notice. While Center was in charge of the war wagon she was assisted and re-

[17] To the extent that Daniel's description of the incident differs from that of other witnesses, it is not credited.

[18] *Wilshire Foam Products*, 282 NLRB 1137, 1157 (1987).

lieved by Prusad Sonuguvia, a student, among others. The war wagon operated during the day from 10 a.m. to 3:30 p.m.

When Center abandoned her job, Prusad was given the cashier's job on the war wagon on an apparently temporary basis while several full-time unit employees were assigned to help him during the busy luncheon period and relieve him during breaks. As cashier, Prusad worked about a 32-hour week. This situation continued on into June when the quarter ended and the cart ceased operating for the summer vacation period.

Reintroduction of the war wagon was scheduled to coincide with the beginning of the new term in September 1993. The job of cashier on the war wagon was posted for bid by unit employees about this time. Jackie Shaver, a full-time unit employee and member of the UE bid on and was awarded the job. She started as of September 11. In accordance with past practice, she was assisted during the busy luncheon schedule by a student who also relieved her during her break periods. She worked a 32-hour week.

At some point in time, prior to April 1 when Lisa Center left her job on the war wagon, Thomas Wilson reached the conclusion that it would be better to have a student operate the war wagon rather than a full-time member of the unit. This conclusion was based on several factors. First of all, students were paid less than unit personnel and received no benefits. This was important to Respondent because the financial return on the investment in the war wagon was less than had been hoped. Secondly, the use of a student rather than a full-time unit employee to run the war wagon provided greater flexibility. Wilson explained that if a full-time employee is permanently assigned to the war wagon and it rains, the war wagon is closed down and that employee does not work. He could lose 3 or 4 days in a week due to inclement weather. On the other hand, if students are assigned and it rains, the students are not that adversely affected to the same degree since they are employed on an irregular basis anyway, frequently working a mere 1 or 2 hours at a time, at peak hours or to relieve the full-time unit employees. Thus, if a student is scheduled to work on the war wagon and it rains, he can just study or go to the library. A student would mind the loss of employment far less than would a full-time unit employee trying to support a family.

With these considerations in mind, Wilson called Gwendolyn Talbert and Virginia Campbell into his office to discuss the matter with them. He asked them about the possibility of replacing the full-time unit cashier customarily operating the war wagon with a student, explaining fully his reason for wanting to do so—the financial aspect as well as the matter of flexibility. Both Talbert and Campbell rejected Wilson's proposal and insisted that the position remain union.

After Center left the employ of Respondent, and Prusad began to operate the war wagon, this fact came to the attention of Talbert and Campbell. In late April, fearful of losing unit work to the students, Talbert and Campbell went to Wilson to question him about why Prusad was operating the war wagon.

With regard to the cost of operation of the war wagon, Wilson admitted stating: ''financially . . . it would not make a lot of sense for me to open the cart if we had to put a union associate on there.'' Comparative costs were discussed and, according to both Talbert and Campbell, Wilson said that if he ''had to hire a union associate for the war wagon [he] would close it down'' because it didn't make enough money. Although Wilson denied making this latter statement, it is not all that different from the one he admitted making, when considered in the context of the conversation.

As noted supra, the war wagon was not shut down, except for summer vacation, and when it was brought back into service on schedule it was operated as customary, by a full-time unit employee aided as usual by a student helper. As of the date of the hearing, that was still the case.

In General Counsel's brief no theory is offered and no cases cited as to why the above-described incident should be regarded as a violation of the Act. Apparently, General Counsel equates the instant situation to the myriad of cases appearing in each of the over 300 NLRB volumes in which a respondent employer involved in an initial organizational drive threatens ''to close the plant if the Union gets in.'' The threat is that even if the employees choose representation, it will not gain them representation because they will not have a job.

But the instant case is not one involving an organizational drive. Respondent was not trying to keep a union out. On the contrary, it had recognized the UE as the bargaining representative of its employees and was in the process of negotiating a collective-bargaining agreement at the time of the incident. Wilson did not threaten Talbert and Campbell in violation of Section 8(a)(1) of the Act but rather tried to convince them through good faith, give-and-take discussion that the operation of the war wagon was not financially feasible if Respondent had to pay the union rate and benefits. Wilson failed in his efforts to convince the UE on this point and the war wagon to this day is manned by a unit employee. To take Wilson's statement out of its good-faith bargaining context and find him in violation of the Act, because he chose to express his opinion the way he did, would have an adverse effect on peaceful discussion and undermine the resolving of issues through negotiations. I find no violation with regard to this allegation.

I have found that Respondent has not violated Section 8(a)(3) or (5) of the Act but has independently violated Section 8(a)(1) of the Act in certain circumstances. Thus, I have found that Respondent violated the Act by its removal of UE notices from the bulletin board; its issuance of the warning memorandum to employees for participating in the UE rally; and its telling employees that they are not allowed to engage in discussions relating to the Union (UE).

VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent occurring in connection with Respondent's operations, all described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent Marriott Management Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The UE and HERE are labor organizations within the meaning of Section 2(5) of the Act.

3. By removing UE notices from the bulletin board, issuing warning memoranda to employees for participating in a UE rally, and by telling employees that they are not allowed to engage in discussions relating to the Union (UE), Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Marriott Management Services, Inc., Fairborn, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing UE notices from the bulletin board, issuing warning memoranda to employees for participating in UE rallies, and telling employees that they are not allowed to engage in discussions relating to the Union (UE).

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its plant in Fairborn, Ohio, copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT remove UE notices from the bulletin board.

WE WILL NOT issue warning memoranda to employees for participating in UE rallies.

WE WILL NOT tell employees that they are not allowed to engage in discussions relating to the Union (UE).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MARRIOTT MANAGEMENT SERVICES, INC.